

# THE WOMAN IN THE ROMAN SOCIETY

## Ideals – Law – Practice

Jakub Urbanik

Meeting 7 Divorce: Principles – why so easy? – General Attitude towards Divorce – Frequency of divorces? Adultery and divorce.

### **i. General principles:**

D. 24.2.1. *Paulus, On the Edict, Book XXXV*. Marriage is dissolved by divorce, death, captivity, or by any other kind of servitude which may happen to be imposed upon either of the parties.

D. 24.2.2. *Gaius, On the Provincial Edict, Book XI*. The word divorce is derived either from diversity of opinion, or because those who dissolve their marriage go different ways. (1) In cases of repudiation, that is to say, in renunciation of marriage, the following words are employed: *tuas res tibi habeto* “Get yourself your things” or *tuas res tibi agito* “Look after your things.” (...)

(3) It makes no difference whether the renunciation takes place in the presence or in the absence of the person under whose control one of the parties may be, or of him who is under said control.

D. 24.2.3. *Paulus, On the Edict, Book XXXV*. It is not a true or actual divorce unless the purpose is to establish a perpetual separation. Therefore, whatever is done or said in the heat of anger is not valid, unless the determination becomes apparent by the parties persevering in their intention, and hence where repudiation takes place in the heat of anger and the wife returns in a short time, she is not held to have been divorced.

D. 24.2.6. *Julianus, Digest, Book LXII*. The wives of those who are in the hands of the enemy can be considered to always retain the place of married women, solely on the ground that others cannot rashly marry them. And, generally speaking, it must be said that, so long as it is certain that the husband is in captivity and is living, his wife has not the right to form another matrimonial connection, unless she herself has given some cause for repudiation. But if it is uncertain whether the husband who is held by the enemy is living or dead, then, if the term of five years has passed from the time when he was taken captive, his wife will have the right to marry again, so that the first marriage will be held to have been amicably dissolved, and each one of the parties will have their respective rights annulled. The same rule must be observed where a husband remains at home, and his wife is taken captive.

D. 24.2.9. *Paulus, On Adultery, Book II*. No divorce is valid unless it takes place in the presence of seven Roman citizens, who are of age, in addition to the freedman of the party who institutes proceedings for that purpose. We understand the freedman to be one who has been manumitted by the father, the grandfather, the great-grandfather, and other ascendants interested in the proceedings above mentioned.

D. 24.1.64. *Javolenus, On the Last Works of Labeo, Book VI*. A man gave something to his wife after a divorce had taken place, to induce her to return to him; and the

woman, having returned, afterwards obtained a divorce. Labeo and Trebatius gave it as their opinion in a case which arose between Terentia and Mæcenas, that if the divorce was genuine, the donation would be valid, but if it was simulated, it would be void. However, what Proculus and Caecilius hold is true, namely, that a divorce is genuine, and a donation made on account of it is valid, where another marriage follows, or the woman remains for so long a time unmarried that there is no doubt of a dissolution of the marriage, otherwise the donation will be of no force or effect.

D. 24.2.10. *Modestinus, Rides, Book I.* A freedwoman, who has married her patron, cannot separate from him without his consent, unless she has been manumitted under the terms of a trust, for then she can do so even though she is his freedwoman.

*Ulpianus, On the Lex Julia et Papia, Book III.* Where the law says: "A freedwoman, who is married to her patron, shall not be granted the right to divorce" this is not held to have made the divorce ineffective, because marriage is ordinarily dissolved by the Civil Law; therefore we cannot say that the marriage exists, as a separation has taken place. Again, Julianus says that a wife is not under such circumstances entitled to an action to recover her dowry; hence it is reasonable that when her patron desires her to remain his wife she cannot marry anyone else. For, as the legislator understood that the marriage was, to a certain extent, dissolved by the act of the freedwoman, he prevented her marriage with another, wherefore if she should marry anyone else, she will be considered as not married. Julianus, indeed, goes farther, for he thinks that such a woman cannot even live in concubinage with anyone except her patron.

(1) The law says: "As long as the patron desires her to remain his wife." This means that the patron wishes her to be his wife, and that his relationship towards her should continue to exist; therefore where he either ceases to be her patron, or to desire that she should remain his wife, the authority of the law is at an end.

(2) It has been most justly established that the benefit of this law terminated whenever the patron, by any indication of his will whatsoever, is understood to have relinquished his desire to keep the woman as his wife. Hence, when he institutes proceedings against his freedwoman on the ground of the removal of property, after she had divorced him without his consent, our Emperor and his Divine Father stated in a Rescript that the party was understood to be unwilling that the woman should remain his wife, when he brings this action or another like it, which it is not customary to do unless in case of divorce. Wherefore, if the husband accuses her of adultery or of some other crime of which no one can accuse a wife but her husband, the better opinion is that the marriage is dissolved; for it should be remembered that the wife is not deprived of the right to marry another except where the patron himself desires to retain her in that capacity. Hence, whenever even a slight reason indicates that the husband does not desire her to remain his wife, it must be said that the freedwoman has already acquired the right to contract marriage with another. Therefore, if the patron has betrothed himself to, or destined himself for some other woman, or has sought marriage with another, he must be considered to no longer desire the freedwoman to be his wife. The same rule will apply where he keeps the woman as his concubine.

## 2. General Attitude towards Divorce

### a) Law

D. 24.1.60.1 (*Hermogenianus, Epitomes of Law*) Donations are permitted between husband and wife in case of divorce; for this often happens either on account of the husband entering the priesthood, or because of sterility,

D. 24.1. 61. *Gaius, On the Provincial Edict, Book XL* Or where marriage cannot conveniently exist on account of old age, illness, or military service,

D. 24.1.62. *Hermogenianus, Epitomes of Law, Book II.* And for these reasons the marriage is dissolved with a friendly disposition.

### b) Moralists/Satirists

*Seneca, On Benefits, 3.16.2-3:* Is there any woman that blushes at divorce now that certain illustrious and noble ladies reckon their years, not by the number of consuls, but by the number of their husbands, and leave home in order to marry, and marry in order to be divorced? They shrank from this scandal as long as it was rare; now, since every gazette has a divorce case, they have learned to do what they used to hear so much about. Is there any shame at all for adultery now that matters have come to such a pass that no woman has any use for a husband except to inflame her paramour? Chastity is simply a proof of ugliness. Where will you find any woman so wretched, so unattractive, as to be content with a couple of paramours - without having each hour assigned to a different one? And the day is not long enough for them all, but she must be carried in her litter to the house of one, and spend the night with another. She is simple and behind the times who is not aware that living with one paramour is called "marriage"! As the shame of these offences has disappeared now that their practice has spread more broadly, so you will make ingrates more numerous and increase their importance if once they begin to count their number.

*Juvenal, Satire 6:220 ff:* If you are honestly uxorious, and devoted to one woman, then bow your head and submit your neck ready to bear the yoke. Never will you find a woman who spares the man who loves her; for though she be herself aflame, she delights to torment and plunder him. So the better the man, the more desirable he be as a husband, the less good by far will he get out of his wife. No present will you ever make if your wife forbids; nothing will you ever sell if she objects; nothing will you buy without her consent. She will arrange your friendships for you; she will turn your now-aged friend from the door which saw the beginnings of his beard. Panders and trainers can make their wills as they please, as also can the gentlemen of the arena; but you will have to write down among your heirs more than one rival of your own. "Crucify that slave!" says the wife. "But what crime worthy of death has he committed?" asks the husband; "where are the witnesses? who informed against him? Give him a hearing at least; no delay can be too long when a man's life is at stake!" "What, you numskull? you call a slave a man, do you? He has done no wrong, you say? Be it so; this is my will and my command: let my will be the voucher for the deed." Thus does she lord it over her husband. But before long she vacates her kingdom; she flits from one home to another, wearing out her bridal veil; then back she flies again and returns to her own imprints in the bed that she has abandoned, leaving behind her the newly decorated door, the festal hangings on the walls, and the branches green still over the threshold. Thus does the tale of her husbands grow; there will be eight of them in the course of five autumns--a fact worthy of commemoration on her tomb!

*Martial Epigrams 6:7*: Iulia lex populis ex quo, Faustine, renata est  
Atque intrare domos iussa Pudicitia est,  
Aut minus aut certe non plus tricesima lux est,  
Et nubit decimo iam Telesilla viro.  
Quae nubit totiens, non nubit: adultera lege est.  
Offendor moecha simpliciore minus

Since the time the Julian Law came back to life, since Modesty was ordered to enter the houses, no more no less have passed thirty lights and Telesilla has married already the tenth husband. The one who marries so many times, marries not, she is a legal adulteress. I am less offended by a simple harlot.

*Laudatio Turiae* (25) When peace had been restored throughout the world and the lawful political order reestablished, we began to enjoy quiet and happy times. It is true that we did wish to have children, who had for a long time been denied to us by an envious fate. If it had pleased Fortune to continue to be favourable to us as she was wont to be, what would have been lacking for either of us? But Fortune took a different course, and our hopes were sinking. The courses you considered and the steps you attempted to take because of this would perhaps be remarkable and praiseworthy in some other women, but in you they are nothing to wonder at when compared to your other great qualities and I will not go into them.

(31) When you despaired of your ability to bear children and grieved over my childlessness, you became anxious lest by retaining you in marriage I might lose all hope of having children and be distressed for that reason. So you proposed a divorce outright and offered to yield our house free to another woman's fertility. Your intention was in fact that you yourself, relying on our well-known conformity of sentiment, would search out and provide for me a wife who was worthy and suitable for me, and you declared that you would regard future children as joint and as though your own, and that you would not effect a separation of our property which had hitherto been held in common, but that it would still be under my control and, if I wished so, under your administration: nothing would be kept apart by you, nothing separate, and you would thereafter take upon yourself the duties and the loyalty of a sister and a mother-in-law.

(40) I must admit that I flared up so that I almost lost control of myself; so horrified was I by what you tried to do that I found it difficult to retrieve my composure. To think that separation should be considered between us before fate had so ordained, to think that you had been able to conceive in you mind the idea that you might cease to be my wife while I was still alive, although you had been utterly faithful to me when I was exiled and practically dead!

(44) What desire, what need to have children could I have had that was so great that I should have broken faith for that reason and changed certainty for uncertainty? But no more about this! You remained with me as my wife, for I could not have given in to you without disgrace for me and unhappiness for both of us.

(48) But on your part, what could have been more worthy of commemoration and praise than your efforts in devotion to my interests: when I could not have children from yourself, you wanted me to have them through you good offices, and since you despaired of bearing children, to provide me with offspring by my marriage to another woman.

(51) Would that the life-span of each of us had allowed our marriage to continue until I, as the older partner, had been borne to the grave—that would have been juster—and you had performed for me the last rites, and that I had died leaving you still alive and that I had had you as a daughter to myself in place of my childlessness.

*Apuleius, Apologia (trans. by H.E. Butler (1909)), 92:* This, as I say, I will prove from the actual deed of settlement. It may be that Aemilianus will still refuse to believe that the total sum recorded is only 30,000 sesterces, and that the reversion of this sum is given by the settlement to Pudentilla's sons. Take the deeds into your own hands, give them to Rufinus who incited you to this accusation. Let him read them, let him blush for his arrogant temper and his pretentious beggary. He is poor and ill-clad and borrowed 400,000 sesterces to dower his daughter, while Pudentilla, a woman of fortune, was content with 300,000, and her husband, who has often refused the hand of the richest heiresses, is also content with this trifling dowry, a mere nominal sum. He cares for nothing save his wife and counts *harmony with his spouse and great love* as his sole treasure, his only wealth. Who that had the least experience of life, would dare to pass any censure if a widow of inconsiderable beauty and considerable age, being desirous of marriage, had by the offer of a large dowry and easy conditions invited a young man, who, whether as regards appearance, character or wealth, was no despicable match, to become her husband? A beautiful maiden, even though she is poor, is amply dowered. For she brings to her husband a fresh untainted spirit, the charm of her beauty, the unblemished glory of her prime. The very fact that she is a maiden is rightly and deservedly regarded by all husbands as the strongest recommendation. For whatever else you receive as your wife's dowry you can, when it pleases you and if you desire to feel yourself under no further obligation, repay in full just as you received it; you can count back the money, restore the slaves, leave the house, abandon the estates. Virginity only, once it has been given, can never be repaid; it is the one portion of the dowry that remains irrevocably with the husband.

A widow on the other hand, if divorced, leaves you as she came. She brings you nothing that she cannot ask back, she has been another's and is certainly far from tractable to your wishes; she looks suspiciously on her new home, while you regard her with suspicion because she has already been parted from one husband: if it was by death she lost her husband, the evil omen of her ill-starred union minimizes her attractions, while, if she left him by divorce, she possesses one of two faults: either she was so intolerable that she was divorced by her husband, or so insolent as to divorce him. It is for reasons of this kind among others that widows offer a larger dowry to attract suitors for their hands. Pudentilla would have done the same had she not found a philosopher indifferent to her dowry.

### **3. Obligation to divorce:**

48.5.1 (Ulpian, *On Adultery*, book 1) The Julian law on adultery was introduced by the divine Augustus ...

48.5.2 (Ulpian, *Disputations*, book 8) (2) The crime of pimping is included in the Julian law of adultery, as a penalty has been preserved against a husband who profits pecuniarily by the adultery of his wife, as well as against one who retains his wife after she has been taken in adultery.

(8) If the husband and the father of the woman appear at the same time for the purpose of accusing her, the question arises, which of them should be given the

preference? The better opinion is that the husband should be entitled to the preference, for it may well be believed that he will prosecute the accusation with greater anger and vexation ...

48.5.9 (Papinian [21]) Anyone who knowingly lends his house to enable unlawful sexual intercourse or adultery to be committed there with a matron who is not his wife, or with a male, or who pecuniarily profits by the adultery of his wife, no matter what may be his status, is punished as an adulterer ...

48.5.11 (Papinian, *On Adultery*, book 2) (pr.) A matron [22] means not only a married woman but also a widow. (1) Women who lend their houses, or have received any compensation for (revealing) unlawful intercourse which they know, are also liable under this section of the law. (2) A woman who gratuitously acts as a procuress for the purpose of avoiding the penalty for adultery, or hires her services to appear in the theatre, can be accused and convicted of adultery under the decree of the senate.

48.5.12 (Papinian, *Adultery*, sole book) (8) A woman, prosecuted for adultery after the death of her husband, (9) asks for delay on account of the youth of her son. I answered: This woman does not seem to have a just defence who offers the age of her son as a pretext for evading a legal accusation. For the charge of adultery brought against her does not necessarily prejudice the child, since she herself may be an adulteress, and the child still have the deceased for his father.

(12) A woman, having heard that her absent husband was dead, married another, and her first husband afterwards returned. I ask, what should be decided with reference to this woman? The answer was that the question is one of both law and of fact; for a long time had elapsed without any proof of unlawful sexual intercourse having been made, and the woman, having been induced by false rumours, and, as it were, released from her former tie, married a second time in accordance with law, as it is probable that she was deceived, and she can be held to have done nothing deserving of punishment. If, however, it is established that the supposed death of her husband furnished an inducement for her marrying a second time, as her chastity is affected by this fact, she should be punished in proportion to the character of the offence.

(13) I married a woman accused of adultery, and, as soon as she was convicted, I repudiated her. I ask whether I should be considered to have furnished the cause of the rupture. The answer was that, since by the Julian law you are prohibited from keeping a wife of this kind, it is clear that you should not be considered to have furnished the cause for the divorce. Therefore, the law will be applied just as if a divorce had taken place through the fault of the woman.

48.5.20 (Ulpian, *Lex Julia on Adultery*, book 2) (3) If the adulterer should be acquitted, a married woman cannot be accused, either by the person who prosecuted the adulterer and was defeated, or even by another. So also if the accuser agrees with the adulterer through collusion and the adulterer is acquitted, he has given to the married woman immunity against all other accusers. She can be accused if she should cease to be married, for the law only protects a woman as long as she is married.